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No. 86-49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN ELECTRIC POWER COMPANY, INC., *et al.*,
Petitioners,

v.

KENTUCKY PUBLIC SERVICE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

and

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court, the Edison Electric Institute ("EEI") respectfully moves for leave to file the attached brief as *amicus curiae*.[1]

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[1] EEI has obtained consent to file this brief from the Petitioners and a Respondent, the Concerned Citizens of Martin County. The letters granting consent have been filed with the Clerk of the Court. The other Respondents have not consented to EEI's participation.

SPECIAL INTEREST OF THE EDISON ELECTRIC INSTITUTE

EEI's members are investor-owned electric utilities that generate, transmit and sell electricity at wholesale and at retail throughout the nation. These services are made available to customers via power supply and distribution arrangements that cross state lines, creating a nationwide power system that requires uniform and predictable regulation.

At issue in this case are matters of urgent concern to virtually every member system of EEI, almost all of whom participate in one or more forms of interstate transactions, incurring costs pursuant to federally-approved rates which are then scrutinized by state utility commissions with results often at variance with federal regulation. All utilities have a stake in the availability of the federal district courts for the arbitration of such federal questions as preemption and undue burden on interstate commerce. Every electric utility company faces the potential conflict between federal and state regulation of contracts and rates that is an inevitable result of our system of dual regulation and interstate power arrangements.

This clash between two regulators will arise in many factual situations, some similar to and others differing from the one that the Petitioners are now presenting to the Court. As utilities become more deeply involved in interstate arrangements, the same question of the scope of the Federal Energy Regulatory Commission's plenary jurisdiction over such transactions will arise—as will the question of whether and if so, when, a federal district court should abstain from deciding that question on the merits. EEI's members have a vital interest in this Court's evaluation of the interplay between federal and state interests in public utility regulation that goes beyond the specific factual issue presented by the Petitioners.

EEI believes that it can provide insight as to the national scope of the concerns at issue in this case. The attached brief as *amicus curiae* demonstrates the significance of these issues to all of EEI's members.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the attached brief, EEI respectfully requests that the Court grant its motion for leave to file the attached brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE* EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") is the nation's association of investor-owned electric utilities. The members of EEI supply electric service to consumers throughout the United States, serving approximately 96 percent of all customers of investor-owned utilities and 73 percent of this country's electricity users.

Electricity plays a role well beyond a convenience—it is a necessity for everyday life. Increasingly, the ability to provide this critical resource on a reliable and economic basis rests upon an array of wholesale transactions among EEI's members, transactions that include regional power

pooling and coordination, purchases, sales, exchanges, interconnections, and transmission arrangements. These wholesale flows of power extend across every state border in the continental United States, and provide enormous benefits to power consumers.

There can be no question that the maintenance of a reliable network of power generation, transmission, and distribution is a task that is national in scope and consequence. Because each state strives to achieve the lowest electric rates for its residents and native industries, the allocation of costs for multistate energy resources such as large generating plants and transmission grids raises issues in which a state's interests will compete with those of its neighbors. The cost allocations and other adjustments that must be made can be accomplished only by a neutral federal arbitrator. The rates and other conditions governing interstate wholesale power and transmission transactions are therefore administered exclusively by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act ("FPA" or "the Act"). At the close of the last term, this Court emphasized the need for federal oversight of these interstate power operations. *Nantahala Power & Light Co. v. Thornburg*, 54 U.S.L.W. 4676 (U.S. June 17, 1986) ("*Nantahala*").

One means by which states have sought to advance the interests of their ratepayers is by disallowing a utility's costs incurred under the rates and other terms of wholesale transactions regulated by FERC. These "trapped costs", as the Court described them in *Nantahala*, must then be borne either by another state's ratepayers [1] or by the public utility's shareholders. The response of other states is predictable—a similar rejection of the cost burden.

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[1] Ironically, it is the interstate character of the transactions involved that provides a ready vehicle for a state to attempt to shift a cost burden to another state.

As dramatically illustrated by the controversies of this nature to date, when a utility's costs are "trapped" by conflicting retail and wholesale rate orders, it suffers immediate financial repercussions. Its cash flow is disrupted, and its ability to make needed purchases of fuel or power and to finance additional capital expenditures is diminished. Such orders can quickly precipitate grave financial crises, and interrupt the operation of wholesale power transactions affecting utilities in several states. EEI members that have invested in generating plant or transmission facilities owned by several utilities serving retail customers in different states may also find the financial vitality of their co-owners, and hence of a project, affected by the retail rate actions of other state commissions.

The adverse effects of such financial distress are felt not only by shareholders, but by the utility's customers as well, because the company's ability to attract capital and operate on a least-cost basis is impaired. Unless promptly remedied, these events cannot help but discourage reliance upon interstate interconnections and pooling arrangements—transactions that increase the interstate availability of economic and reliable electrical energy at competitive prices.

EEI's members have a vital interest in securing a prompt and fair arbitration of conflicts that arise when state actions upset the complex network of interstate power operations. Delay in obtaining redress can devastate a utility wedged between inconsistent state and federal regulation. In *Nantahala*, the Court unanimously ruled that a North Carolina utility commission was preempted from disallowing in retail rates millions of dollars incurred under wholesale power arrangements established by FERC.[2] This Court's decision came, however, only after several years of delay and great financial hardship

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[2] EEI also participated in the *Nantahala* proceedings in this Court through the filing of an *amicus* brief.

for the utility in that case, prompted by a federal district court's decision [3] to abstain from hearing an earlier challenge to the state commission's rate order.

Now, the Sixth Circuit has also held in the *American Electric Power* (*"AEP"*) case below that federal district courts should abstain from reviewing cases where state orders are challenged as violating the federal scheme of oversight. The case before the Court here thus presents the companion to *Nantahala*. *Nantahala* established the principle—this case raises the question of how that principle is to be honored.

STATEMENT OF THE CASE

EEI adopts the Petitioners' Statement of the Case.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

I. THE DECISION BELOW PRESENTS A PROBLEM IN FEDERAL COURT ADMINISTRATION THAT WILL BE EXACERBATED IF LEFT UNRESOLVED.

No issue is as quintessentially suited to instruction from this Court as the question of how the federal judiciary should deploy its jurisdiction.[4] If district courts abstain under the circumstances presented to the Sixth Circuit, the burgeoning array of cases raising the same

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[3] *Aluminum Co. of America v. Utilities Comm'n of N.C.*, No. 82-376 (E.D.N.C. July 30, 1982), *aff'd*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) (*"Alcoa"*).

[4] The opinion of the Sixth Circuit is unpublished, despite motions by the Petitioners and FERC to have it published. This should not, however, deter the Court from granting certiorari. Rule 24 of the local rules of the Sixth Circuit permits the citation of unpublished decisions in that Circuit. Hence, the case can have precedential value. *See* 6th Cir. R. 24(b). Moreover, this Court has on a number of occasions granted certiorari for unpublished decisions. *See, e.g., DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983); *Branti v. Finkel*, 445 U.S. 507, 509 (1980); and *Brown v. Felsen*, 442 U.S. 127, 130 (1979).

issues will merely be deflected to this Court time after time for decision.

In contrast to the Sixth Circuit, the Third, Fifth and Eighth Circuits have all very recently addressed cases factually similar to the *AEP* case, but have found abstention to be inappropriate.[5] The Sixth Circuit's invocation of abstention has been joined only by the Fourth Circuit in *Alcoa* (*supra* n.3), although the Sixth Circuit expressly declined to follow the Fourth Circuit's reasoning in *Alcoa*. It should be noted that subsequent to *Alcoa*, in *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F. Supp. 64 (S.D.W.Va.), *aff'd*, 770 F.2d 159 (4th Cir. 1985) (*"Appalachian Power"*), the Fourth Circuit, in an unpublished decision, affirmed a district court injunction of a state rate commission order on grounds of preemption, without expressly addressing the question of whether the district court should have invoked abstention theory. Notably, *Appalachian Power* involved the same transmission equalization agreement as that involved in the Sixth Circuit. In short, five circuits have addressed virtually the same problem; one squarely favors abstention, one has favored abstention when the issue was before it, and three do not.[6]

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[5] *Kentucky W.Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 791 F.2d 1111 (3d Cir. 1986) (decided under the Natural Gas Act); *New Orleans Pub. Serv., Inc. v. New Orleans*, 782 F.2d 1236 (5th Cir. 1986) (*"NOPSI"*); and *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 884 (1986) (*"Middle South"*). On June 10, 1986, however, the Fifth Circuit requested the parties to submit further briefing on the question of whether the district court in *NOPSI* should have abstained. The FERC has stated its concern about the threat posed to the integrity of the federal scheme of regulation that abstention creates, both in a brief on appeal of the district court's abstention in *NOPSI*, and in response to the Fifth Circuit's June 10 request for further briefing on the matter.

[6] In addition, the U.S. District Court for the Western District of Missouri, in *Arkansas Power & Light Co. v. Missouri Public Service Commission*, No. 86-4067 (W.D.Mo. March 10, 1986), ruled against abstention, citing the *NOPSI* case.

In considering whether to grant certiorari, this Court has traditionally accorded weight to the existence of a split among the circuits in cases involving the same question of law.[7] The split, here, however, points up an even more urgent reason for review. The many occasions on which federal district courts are facing these cases reveal a burgeoning trend in state utility commissions. At the very time that utilities are moving toward a greater reliance upon multistate transactions, states like Kentucky in the case below and like North Carolina in the *Nantahala* case are encroaching on the federal administration of interstate wholesale power and transmission arrangements.

In *Nantahala*, this Court resolved the substantive law on the question—and in so doing, indicated that the question is one reserved to the federal domain. Yet without effective arbitration of these matters before the federal district courts, utilities will have no route other than that forced upon the utility in *Nantahala* when the district court abstained; that is, to face years of crushing delay while the matter is pursued through the state court system, and, at the end of that struggle, to seek redress through a direct appeal to this Court.

Now that the Supreme Court has spoken, these questions are far better suited to district court adjudication. The controversies will inevitably call upon the decisionmaker to probe how costs may be "trapped", and whether the state has crossed over the line that separates proper local ratemaking from federal oversight of the interstate power grid. The facts will vary from case to case, some involving regional pooling agreements and multistate cost allocations; others, unit power sales among multistate affiliates; still others, the proper level of costs to be included in the rate charged by one utility to another in a bilateral wholesale arrangement. The practical result of abstention

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[7] *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, §§ 4.3-4.4 (6th ed. 1986), and discussion therein.

is to force resort to the Supreme Court for repeated resolution of these detailed matters that are far more readily and efficiently resolved by federal district courts.[8] To allow the Sixth Circuit's decision to stand will encourage further isolation of the federal district courts from key national power issues and unnecessarily burden this Court's docket.

II. THE FEDERAL INTEREST AT STAKE IN THE CASE BELOW PRESENTS A SETTING WHERE ABSTENTION IS NOT ONLY INAPPROPRIATE TO THE ISSUES, BUT EFFECTIVELY PREJUDGES THE FEDERAL CLAIM.

Firm guidance from this Court is needed, as highlighted not only by the split of authority among the circuits, but also among the three judges who rendered the decision below. *See* Pet. at 7-8. The opinion of the court was accompanied by two separate concurrences. The Sixth Circuit's *per curiam* decision stated that *Younger* abstention applied, but not *Burford* abstention. *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Two members of the three-judge panel disagreed, however, maintaining that *Burford* abstention did apply. Pet. App. at 7a, 10a. One Judge stated that *Younger* did not apply. Pet. App. at 10a. Thus, of the three, no single judge was able to agree with the others as to the appropriate analysis of abstention principles.

The Sixth Circuit's broad application of the abstention doctrine is at complete odds with this Court's guidance that federal district courts possess a "virtually unflagging obligation . . . to exercise the jurisdiction given them" and that abstention is to occur only in exceptional cir-

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[8] This Court has noted that appellate review is an "inadequate substitute" for an adjudication by a federal district court. *See England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964) (*Pullman* abstention).

cumstances. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976) (*"Colorado River"*). By its ruling, however, the Sixth Circuit allows the exception to swallow the rule.

At their core, both *Younger* and *Burford* abstention are premised on comity in the face of state interests and proceedings. Where the question before the court is preemption or a Commerce Clause challenge, however, the decision to abstain is in effect a decision on the merits of the substantive question, because the court has already determined that state interests outweigh federal concerns. *See, e.g., Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) (*citing International Bhd. of Electrical Workers v. Pub. Serv. Comm'n of Nev.*, 614 F.2d 206, 212 n.1 (9th Cir. 1980)) (preemption).

Thus, when the divided Sixth Circuit panel ruled that abstention—either *Younger* or *Burford*—was appropriate, it necessarily ruled that the purported state interests outweighed any federal considerations.[9] That decision effectively decided the federal question in a fashion directly contrary to *Nantahala*, but concealed review of the issue under the guise of a doctrine rooted in equitable discretion.

A. Where State Action Directly Thwarts A Federal Scheme Of Regulation, The Interest At Stake Is Federal, And *Younger* Abstention Is Inapposite.

The Sixth Circuit's decision to apply *Younger* abstention policy is a unique application of the doctrine to a

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[9] In *Baggett v. Department of Professional Regulation, Board of Pilot Commissioners*, 717 F.2d 521, 524 (11th Cir. 1983) (*"Baggett"*), the Eleventh Circuit noted that when Congress asserts its exclusive jurisdiction, it has "decreed" that no deference is due state proceedings that interfere with the federal domain. The court implicitly acknowledged that abstention would fail to give federal interests their due weight.

preemption challenge of a state utility commission decision. Not even the Fourth Circuit in *Alcoa* went so far.[10] In fact, this case presents the opposite of *Younger*. Here, the state order directly interferes with the federal execution of FERC's statutory obligations.

The most recent discussion by this Court of *Younger* was in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 54 U.S.L.W. 4860 (U.S. June 24, 1986) (*"Ohio Commission"*). There, the Court noted that *Younger* counsels against federal court interference when *particular kinds* of state proceedings have commenced. *Ohio Commission*, 54 U.S.L.W. at 4862. Although the *Younger* doctrine sprang from recognition of comity and federalism in the face of state criminal proceedings, the Court noted that it had extended *Younger* to those civil proceedings in which "important state interests are involved . . . [and] to state administrative proceedings in which important state interests are vindicated, so long as . . . the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim."[11] *Id. See also Middlesex*, 457 U.S. at 432.

Each of the cases invoked by the Court represented enforcement or disciplinary proceedings that implicated the state's most basic police powers in protecting by the means of sanctions the morals, health or safety of its citizens. *Huffman* involved a proceeding to close an obscene theater as a public nuisance; at issue in *Trainor* was civil attachment as the remedy for fraudulent concealment of assets in obtaining state public assistance.

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[10] In a footnote, the Fourth Circuit adverted favorably to *Younger*, but declined to apply it directly. *Alcoa*, 713 F.2d at 1029 n.2.

[11] *Citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (*"Middlesex"*); *Moore v. Sims*, 442 U.S. 415 (1979) (*"Moore"*); *Juidice v. Vail*, 430 U.S. 327 (1977) (*"Juidice"*); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (*"Trainor"*); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (*"Huffman"*); and *Gibson v. Berryhill*, 411 U.S. 564 (1973) (*"Gibson"*).

Juidice challenged the state's right to imprison individuals for contempt of court, and *Moore* addressed state procedures regarding the removal from the home of allegedly abused children. *Gibson* and *Middlesex* challenged disciplinary proceedings to revoke state-granted professional licenses.

In invoking *Younger*, the Sixth Circuit broadly asserted that "[t]here is little question here that the regulation of consumer electric rates is an important state interest." Pet. App. at 6a. States presumably have a strong interest in every activity they undertake. Not all state interests, however, come within the reach of *Younger*. The state in its role as the regulator of a utility's retail rates is not functioning in the same role as when it enforces its criminal laws, imposes sanctions for wrongful conduct, or disciplines the professionals it licenses. The state *qua* state is not injured, nor are its legitimate interests in the exercise of its police power ignored, by requiring it to give proper effect to FERC-approved rate orders, as *Nantahala* mandates.[12]

In *Middlesex*, the Court also stated that there must be an adequate opportunity in the state tribunal to raise the

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[12] Justice Stewart anticipated this distinction in his concurrence in *Younger*, where he noted:

> Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than in civil cases. . . . The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute.

Younger, 401 U.S. at 55 n.2 (Stewart, J., concurring) (citations omitted). *Accord, Huffman*, 420 U.S. at 604-05. *See also Appalachian Power*, 614 F. Supp. at 70: *Younger* abstention is not appropriate with regard to a preemption claim, because it does not involve a state interest that relates to the health, safety and morals of the state's citizens.

constitutional challenge. *Middlesex*, 457 U.S. at 432. While there may in some instances be a state forum for appeal of a rate order, such avenues are wholly inadequate, given the immediate and devastating repercussions of the state action in question. See p. 3, *supra*. Relief denied for years, while the state judicial system grinds slowly to a conclusion, does not afford "the federal plaintiff . . . a full and fair opportunity to litigate his constitutional claim." *Ohio Commission*, 54 U.S.L.W. at 4862.

Moreover, because ratemaking is a function essentially prospective in nature, sums lost in the interim are often unrecoverable. In any event, the possibility of collection of these "trapped" funds at some future time is an inadequate substitute for justice when millions of dollars are at stake. The long delays also serve to shift the ultimate rate burden of the wholesale costs disproportionately to future ratepayers. *Cf. FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962).

In short, awaiting protracted litigation through state courts with the hope of an eventual appeal and reversal in this Court cannot stem the severe injury that intervenes. In such circumstances, *Younger* abstention is inappropriate.

B. The Issues Here Are Completely Unrelated To Those Found In A *Burford* Context: Federal Adjudication Will Not Disrupt A Complex State Regulatory Scheme Involving State Law Applied To Local Facts.

If the *Younger* doctrine protects the state's interest in exercising its police-related powers without undue federal interference, then *Burford* abstention is designed to protect a state's expert administration of local law as applied to local issues, so that the state may develop unimpeded a coherent state-wide regulatory policy. *Burford*, 319 U.S. at 332-34; *see also Colorado River*, 424 U.S. at 814-

15. In *Burford*, the Court carefully noted the overwhelming state interest at issue, 319 U.S. at 320, and the expertise of the state court system at interpreting specialized state law. *Id.* at 325-26. There, federal review of state law was creating disruption and confusion in a highly technical state program. *Id.* at 327. When instead the issue presented is a state rate order that directly affects interstate wholesale power and transmission arrangements, the question presented is whether the state has jurisdiction to act at all. *Cf. Baggett*, 717 F.2d at 524. In the presence of such claims, a federal district court is the only forum that can properly and efficiently resolve the dispute.

As with *Younger*, these circumstances present the very opposite of those where abstention would be in order. Here, the state tribunal has endeavored to interpret a federal wholesale rate schedule (the AEP system power pool agreement),[13] an interpretation that is exclusively within FERC's authority.[14] Here, it is the federal judiciary that is expert at construing both the federal law and wholesale rate schedules and ensuring a uniform result. Here, the overwhelming interest is that of the federal government, in its attempt to create and enforce a coherent economic policy for interstate power regulation. Here, delay at the state level disrupts the economic justification for power flows across state borders. *See* pp. 1-2, *supra*. In such circumstances, *Burford* abstention is not appropriate. *See, e.g., Middle South*, 772 F.2d at 417.

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[13] *See* Pet. at 4-5.

[14] The Federal Energy Regulatory Commission has expressly stated in *AEP Generating Co.*, Docket No. ER84-579-005, slip op. at 4-5 (August 20, 1986), that it alone must determine the appropriate interpretation of the parties' rights and obligations under the AEP system agreement, as part of its task in determining just and reasonable cost allocations and rates among the AEP members.

III. WHERE THE SIXTH CIRCUIT FOUND THAT REVIEW IS NOT RESTRICTED BY THE JOHNSON ACT, IT WAS INAPPROPRIATE TO ABSTAIN ON MORE GENERAL EQUITABLE GROUNDS.

In the case below, the Sixth Circuit correctly held that the Johnson Act did not bar district court review, because the action was based on preemption grounds.[15] *See* Pet. App. at 19a, and cases cited therein. Having so determined, it was inappropriate for the court to establish a secondary bar to review.

The Johnson Act, 28 U.S.C. § 1342(1) (1982), statutorily embodies the rule of abstention that might otherwise apply, and defines the boundaries of any state interest in regulating local utility rates that is to be shielded from federal court interference. The statute is couched in terms of enumerated conditions that bar the federal district courts from directly interfering in challenges to state rate orders where those conditions are met. *See Tennyson v. Gas Serv. Co.*, 506 F.2d 1135 (10th Cir. 1974). The challenge must have a jurisdictional basis "solely" in diversity of citizenship or "repugnance of the order to the Federal Constitution", may not raise a Commerce Clause claim, and there must be a fair hearing below. As pointed out by the Petitioners, the Sixth Circuit's application of abstention principles is so broad that it would effectively bar any district court from granting equitable relief in a challenge to state orders affecting rates, not matter how great the clash with a federal statute or burden on interstate commerce. Pet. at 14 n.12. The Johnson Act, however, clearly intends that the federal district courts retain their pivotal function in arbitrating such disputes.

Implicit in the Act's construction, legislative history, and application is the notion that its failure as a bar to

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[15] The same result is obtained where a Commerce Clause ground is raised. *See, e.g., Alcoa*, 713 F.2d at 1028; *Appalachian Power*, 614 F. Supp. at 70.

federal adjudication compels a decision not to abstain under any other doctrine. Enacted in 1934 (and earlier codified at 28 U.S.C. § 41(1)), the Johnson Act was designed to limit the broad grant of federal court jurisdiction over constitutional claims which Congress had conferred in 1875. Act of March 3, 1875, 18 Stat. 470. In the wake of the 1875 Act, Congress passed the three-judge panel provision in the Mann-Elkins Act, the Johnson Act governing rate orders, and finally, the Tax Injunction Act, to "hedge and limit" that broad scope of jurisdiction about which "[e]xperience [had given] rise to dissatisfaction." *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 357-58 (1951) (Frankfurter, J., concurring).

The Johnson Act was aimed at curbing utilities' efforts to obtain a second, *de novo* rate hearing in federal district court solely by alleging that the state order effected an unconstitutional confiscation under the Fourteenth Amendment. *See, e.g.*, 80 Cong. Rec. 1916, 1918-19 (Feb. 5, 1934); H.R. Rep. No. 1194, 73d Cong., 2d Sess. 2-3 (1934). Congress believed that the invocation of such broad "constitutional" grounds allowed the federal district courts to inject themselves directly into the state ratemaking function on questions such as property valuation, that were strictly local in character. 80 Cong. Rec. at 1916.[16]

The Act emerged as a legislative effort to restore the balance between state and federal jurisdiction in the midst of an ongoing well-recognized practice of abstention[17] by the courts which was designed to accomplish

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[16] The floor discussion of the bill noted that federal district courts often conducted full hearings before a master, including "a valuation of the [utility] property," and the introduction of expert witnesses, ignoring entirely the hearings held on the same subjects before the state tribunal. 80 Cong. Rec. at 1916.

[17] Although the line of "abstention" cases did not receive this name until *Railroad Commission of Texas v. Pullman Co.*, 312

the same goal. As such, the statute codified a policy of judicial restraint as it applied to rate order cases, specifying some classes of cases, but excluding others. One of the Act's original sponsors emphasized in floor debate that access to the federal district courts would be restricted "in [the] class of cases" specified in the Act. 80 Cong. Rec. at 1918 (remarks of Sen. Norris). By implication, the other state rate order cases, *i.e.*, those involving preemption and burden on commerce, were consciously excluded from the Act's abstention policy.

As this Court noted in *Pullman*, the judge-made doctrine of abstention is "a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." *Pullman*, 312 U.S. at 501. In the Johnson Act, however, Congress already imposed a "rigorous congressional restriction" on such powers, and in the area of state public utility rate orders, enumerated the instances where the state interest involved would require the federal court to stay its hand. No judicially-created supplement is necessary or warranted.

U.S. 496 (1941) ("*Pullman*"), the seed for its fast-growing practice was planted as early as 1908, in *Ex parte Young*, 209 U.S. 123, 166 (1908). By 1919, the federal court practice of abstaining was recognized. *See Pullman*, 312 U.S. at 501 (*citing Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919)). By 1926, this practice was described as a "rule." *Massachusetts State Grange v. Benton*, 272 U.S. 525, 529 (1926).

CONCLUSION

For the foregoing reasons the writ of certiorari should be granted.

Respectfully submitted,

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